

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAVID JACK ROGERS,  
Petitioner,  
v.  
DOUG WADDINGTON,  
Respondent.

Case No. C05-5332FDB

## REPORT AND RECOMMENDATION

**NOTED FOR:  
DECEMBER 23<sup>rd</sup>, 2005**

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. The petitioner is seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

## INTRODUCTION AND SUMMARY CONCLUSION

Petitioner challenges a 2000 Pierce County conviction by jury trial for one count of manufacture of a controlled substance, methamphetamine. The crime was committed September 5<sup>th</sup>, 1998. The court sentenced petitioner to 96 months confinement on August 11<sup>th</sup>, 2000. Having reviewed the petition, the answer, and the remainder of the file the court concludes two of the issues raised are barred, and the remaining two issues are without merit. Stone v. Powell, 428 U.S. 465 (1976). The petition should be **DISMISSED**.

## FACTS

The respondent sets forth the facts as follows:

Early in the morning of September 5, 1998, a newspaper delivery person contacted the Pierce County Sheriff Department to report a suspicious gas cloud and odor coming from property owned by James Gasaway's parents. Exhibit 3A, Unpublished Opinion, at 1-2; Exhibit 3B, Unpublished Opinion, Westlaw version, at 1. The delivery person associated the odor with the manufacture of methamphetamine (meth).

Deputies and the fire department responded to the call. Exhibit 3B at 1. Two of the deputies had prior experience investigating methamphetamine labs, and one also had extensive experience dealing with hazardous chemicals in general. *Id.* at 2.

As the deputies approached the gated driveway located approximately 50 feet from the roadway, they detected a strong smell of ammonia and other chemicals associated with the manufacture of methamphetamine. Sargent became concerned about the potential health and safety risks associated with the fumes and chemicals. Id.

Gasaway and William Fedderson met the deputies as they approached the driveway gate. The deputies went around the gate on a worn pathway and spoke to the two men. David Rogers, whom Deputy Winthrop Sargent had seen near the residence when they first approached, walked away as the deputies talked to the other men. Deputy Sargent became concerned about Rogers' whereabouts. *Id.*

The deputies told the men that they were concerned about the fumes, the potential methamphetamine laboratory, and public health and safety. The deputies noticed that the odor and effect of the fumes became stronger as they proceeded up the driveway; the fumes began to give them headaches. *Id.*

Gasaway told the deputies that he did not want them to search the property because of the possible presence of stolen cars. Deputy Brian Witt reassured Gasaway that they were concerned only about the fumes and were not there to investigate possible stolen vehicles. *Id.*

While Deputy Witt and Deputy John Heacock continued to speak to the men, Deputy Sargent walked up the driveway and around a mobile home on the property where he observed several propane-type pressurized cylinders, a can of carburetor cleaner, several unmarked five gallon buckets, miscellaneous glassware, and several unmarked plastic chemical containers similar to those that contain chemicals related to the manufacture of methamphetamine. The deputies arrested the three men on outstanding warrants and then obtained a search warrant for the property based in part on the items Deputy Sargent had observed when he walked around the property. A subsequent search of Rogers' vehicle revealed numerous items used in the manufacture of methamphetamine. *Id.*

The State charged Rogers with unlawful manufacturing of a controlled substance. Rogers moved to suppress the evidence discovered in his vehicles and on the Gasaway property, arguing that the deputies illegally obtained the information that was in the probable cause affidavit. He contended that he had standing to challenge the search because he had paid Gasaway to allow him to repair his car on the property after it had broken down outside the property. *Id.*

The trial court found that Rogers did not have standing to object to the search and that, even if he did, the deputies entered the property under the emergency exception and discovered the items that supported the search warrant in plain view. Accordingly, the trial court issued the findings of fact and conclusions of law that the search warrant was based upon probable cause, that the search of the property was lawful, that the search of Rogers' person was lawful as incident to arrest, and that the items seized in the search were admissible. *Id.* at 2-3. The trial court denied the motion to suppress. *Id.* at 3.

1 Rogers' defense at trial was that he was present merely to repair his vehicle  
2 and that he was not on the site to participate in a methamphetamine manufacturing  
3 operation. To support this argument, Rogers' counsel told the jury during his opening  
4 statement that Rogers' girlfriend would testify that he spent the preceding night at  
5 home and did not leave until after the gas cloud was reported. Rogers testified to this  
6 effect but his counsel did not call the girlfriend. *Id.* at 3-4.

7 Gasaway testified for the State. He asserted that he had allowed Rogers to  
8 manufacture methamphetamine on the property in exchange for a supply of drugs.  
9 But Gasaway asserted his Fifth Amendment privilege when Rogers' counsel attempted  
10 to ask him about past drug labs on the property. *Id.* at 4.

11 The jury convicted Rogers as charged. *Id.*<sup>1</sup>

12 (Dkt. # 17, Exhibit 3B, Westlaw printout of the unpublished opinion).

13 PROCEDURAL HISTORY

14 Petitioner filed a direct appeal through counsel and argued:

15 The trial court erred in denying Roger's motion to suppress evidence of a  
16 methamphetamine lab where the warrant to obtain evidence of same was issued based  
17 on information that was obtained after the Deputies illegally entered the premises and  
18 searched Roger's vehicle.

19 (Dkt. # 17, Exhibit 4, page 2).

20 Petitioner also filed a pro se brief in which he argued:

21 1. Ineffective assistance of counsel  
22 A. Failure to prepare.  
23 B. Failure to investigate.  
24 C. Failure to subpoena witnesses.  
25  
26 2. Abuse of discretion.

27 (Dkt. # 17, Exhibit 6, page 1).

28 The state court of appeals affirmed the conviction and sentence. (Dkt. # 17, Exhibit 3A and  
29 3B). Petitioner filed a motion for reconsideration which was denied. (Dkt. # 17, Exhibits 8 and 9).

30 Petitioner filed for discretionary review and raised the following issues:

31 1. Ineffective assistance of counsel in that counsel failed to subpoena and present an alibi  
32 witness.  
33 2. Did defendant have a legitimate expectation of privacy on the property?  
34 3. The court erred in failing to suppress evidence improperly obtained.

35 (Dkt. # 17, Exhibit 10, page I and II). The state supreme court denied review without comment.

36  
37 <sup>1</sup>Respondent has submitted the Westlaw version of the unpublished opinion and indicates the  
38 state court of appeals record sent to the Attorney General's Office has a page missing. Petitioner has  
39 not objected and does not contest the accuracy of the record.

1 (Dkt. # 17, Exhibit 11). Petitioner filed two personal restraint petitions which were consolidated.

2 (Dkt. # 17, Exhibits 13 and 14).

3 In the petition filed March 15<sup>th</sup>, 2004 petitioner raised the following issues:

4 1. Whether Roger's Washington State Constitutional Art. 1 § 7 and  
5 United States Constitutional Fourth Amendment rights were violated  
6 by the illegal search that was conducted by the Pierce County Sheriffs  
7 Department?

8 a. Does Rogers have standing to challenge the search of  
9 his property located on the Gasaway property where  
10 Rogers paid rent and had a reasonable expectation of  
11 privacy in his vehicles located thereforth[sic]?

12 2. Whether Rogers' received Ineffective Assistance of Counsel by:

13 a. Trial Counsel's failure to invoke Rogers' confrontation  
14 rights of witness D'angelo-Wencel, where her tip led to  
15 the investigation and subsequent search of the Gasaway  
16 property;

17 b. Failing to request a franks[sic] hearing to determine the  
18 veracity of D'angelo-Wencel's credibility:

19 c. Failing to request a continuance for defense witness  
20 Michelle Logan who would have provided an alibi for  
21 Rogers' activities prior to the search;

22 d. Failing to apply the Aguilar-Spinnelli test to the  
23 newspaper delivery person's (D'angelo-Wencel) tip at  
24 the Motion to Suppress hearing, which resulted in an  
25 illegal search warrant.

26 3. Whether Rogers received ineffective assistance of appellate counsel?

27 4. Whether the Trial Court erred and abused it's discretion by:

28 a. Considering the facts listed in the warrant application  
29 and affidavit that were either incomplete, or inaccurate  
30 to the point of being deceptive, or not specific enough  
31 to constitute probable cause.

32 (Dkt. # 17, Exhibit 13, page 3 and 4).

33 In the petition filed April 19<sup>th</sup>, 2004 petitioner raised one additional claim:

34 1. Whether Petitioner's Sixth Amendment Right to be Confronted with  
35 the witness against him was Violated [sic] by the Trial Court?

36 (Dkt. # 17, Exhibit 14, page 3). On November 30<sup>th</sup>, 2004 the state court of appeals dismissed the  
37 consolidated petitions. (Dkt. # 17, Exhibit 17). Petitioner filed for discretionary review and raised  
38

1 the following issues:

- 2 1. The illegal search of Mr. Rogers' vehicle parked on the Gasaway's  
3 personal property violated the Fourth and Fourteenth Amendments of  
4 the United States Constitution and the Washington State Constitution  
Art. 1 § 7.
- 5 a. Mr. Rogers' was not provided Procedural Due Process of the  
6 Fourteenth Amendment of the Federal Constitution, by not being  
properly notified or properly served a legitimate Search Warrant of his  
personal property in his name.
- 7 b. Mr. Rogers has a reasonable expectation of privacy in premises where  
8 he had friendship with the owner of the property, Mr. James Gasaway,  
the Petitioner's Fourteenth Amendment of the United States  
9 Constitution and Washington States Constitution Art.1§7 was  
violated.
- 10 2. Mr. Rogers, has a right to Effective Assistance of Counsel guaranteed  
11 by The Sixth and Fourteenth Amendment's of the United States  
Federal Constitution. (For any Criminal Proceedings).
  - 12 a. Trial Counsel failed to invoke Mr. Rogers rights of The Confrontation  
13 Clause, whereas, witness Ms. D'angelo-Wencel tip led to the  
investigation and subsequent searches of Mr. Rogers' vehicle.
  - 14 b. Trial Counsel failed to move the Court for a "Franks" hearing to  
determine the Validity[sic] of Deputy Witt's testimony.
  - 15 c. Trial Counsel failed to file a Subpoena, to have defense witness Ms.  
16 Michelle Logan, appear to testify.
  - 17 d. Trial Counsel failed to challenge at the Suppression Hearing (Superior  
18 Court Rule 3.5) the credibility of Ms. D'angelo-Wencel's statement  
(informant).
  - 19 e. Mr. Rogers', Appellant Counsel abandoned an issue to raise, as the  
Right of Standing to Challenge the Search Warrant.
  - 20 3. The Trial Court Abused it's Discretion, when considering facts of the  
21 Warrant and Affidavit that were incomplete or inaccurate. The Trial  
Court erred in finding sufficient Probable Cause for the Search  
Warrant.
  - 22 4. The Trial Court abused it's Discretion, allowing (hearsay) Testimony  
23 of Ms. D'angelo-Wencel, throughout the entire Trial to be used,  
without her physical presence, ( hearsay violation). A United States  
24 Federal violation of the Sixth Amendment of the Constitution, and  
25 Article I § 22 of the Washington State Constitution.

26 (Dkt. # 17, Exhibit 18, pages ii and iii). On April 8<sup>th</sup>, 2005 the state supreme court denied review.

27 (Dkt. # 17, Exhibit 19). This petition followed and petitioner raises four issues:

- 28 1. Unlawful search and seizure of Rogers' car:

- 1 (a) Rogers was not served with the search warrant;
- 2 (b) There was no consent to the search;
- 3 (c) Exigent circumstances did not justify the warrantless search;
- 4 (d) The community caretaking function exception did not justify the warrantless search.
- 5 2. Ineffective assistance of counsel at trial and on appeal:
  - 6 (a) Failure to invoke Rogers' right of confrontation of the 911 caller;
  - 7 (b) Failure to move for a "Franks" hearing;
  - 8 (c) Failure to subpoena the 911 caller, Ms. Wencel;
  - 9 (d) Failure to subpoena Rogers' girlfriend, Ms. Logan;
  - 10 (e) Abandonment by appellate counsel of standing issue.
- 11 3. The trial court abused its discretion by finding sufficient probable cause for the search warrant.
- 12 4. Confrontation Clause violation in the admission of the 911 caller's statement in her call.

11 (Dkt #1). Respondent has answered and concedes that the issues raised are exhausted within the  
12 meaning of 28 U.S.C. § 2254 (e). (Dkt. # 16, page 5).

**EVIDENTIARY HEARING NOT REQUIRED**

14        In its' Order Directing Service and Response, the court directed respondent to state in his  
15 response whether or not an evidentiary hearing was necessary. Accordingly, respondent has  
16 informed the court that he does not think an evidentiary hearing is required. The function of an  
17 evidentiary hearing is to try issues of fact, such a hearing is unnecessary when only issues of law are  
18 raised. *See e.g. Yeaman v. United States*, 326 F.2d 293 (9th Cir. 1963). After careful review of the  
19 record, the undersigned judge concludes that there are no relevant factual disputes to resolve in order  
20 for the court to render its decision in this case. Accordingly, an evidentiary hearing was not  
21 conducted.

## STANDARD

23       Federal courts may intervene in the state judicial process only to correct wrongs of a  
24       constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). Section 2254 is explicit in that a  
25       federal court may entertain an application for writ of habeas corpus “only on the ground that [the  
26       petitioner] is in custody in violation of the constitution or law or treaties of the United States.” 28  
27       U.S.C. § 2254(a). The Supreme court has stated many times that federal habeas corpus relief does  
28       not lie for mere errors of state law. Lewis v. Jeffers, 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S.

1 37, 41 (1984); Estelle v. McGuire, 502 U.S. 62 (1991).

2 A habeas corpus petition shall not be granted with respect to any claim adjudicated on the  
3 merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary  
4 to, or involved an unreasonable application of, clearly established federal law, as determined by the  
5 Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the  
6 facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). Further, a  
7 determination of a factual issue by a state court shall be presumed correct, and the applicant has the  
8 burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C.  
9 §2254(e)(1).

10 DISCUSSION

11 A. Fourth Amendment Search Claims. Issues 1 and 3.

12 Respondent notes that under the Supreme Court holding in Stone v. Powell, 428 U.S. 465  
13 (1976), this court is precluded from considering petitioner's Fourth Amendment challenges to the  
14 search of Gasaway's property and petitioners' car. The Court in Powell held that where a plaintiff  
15 has had a full and fair opportunity to litigate his Fourth Amendment claims in state court, the federal  
16 court is precluded from hearing the claims because the claims are not actually based on the Fourth  
17 Amendment but on the exclusionary rule. The public policy behind exclusion of the evidence is  
18 furthered by allowing the arguments to be raised and the rule applied in state court but not by  
19 allowing a federal court to apply the rule through a writ of habeas corpus. Powell, 428 U.S. at 493.  
20 Respondent's argument is well taken and the court should not consider claims relating to the search  
21 of Rogers' car or the issuance of the search warrant. Accordingly, petitioner's first and third claim  
22 should be **DISMISSED WITH PREJUDICE**.

23 B. Assistance of Counsel Claim 2 (a through e).

24 In order to establish ineffective assistance of counsel, a petitioner must show that counsel's  
25 representation fell below an objective standard of reasonableness and that the deficient performance  
26 affected the result of the proceeding. Strickland v. Washington, 466 U.S. 668, 686 (1984).

27 Under the first prong of the Strickland test, the question is whether counsel's assistance was  
28 reasonable under the totality of the circumstances, viewed as of the time of counsel's conduct.

1 Strickland, 466 U.S. at 690. To succeed under the first prong, the petitioner must show the  
 2 attorney's conduct reflects a failure to exercise the skill, judgment, or diligence of a reasonably  
 3 competent attorney. United States v. Vincent, 758 F.2d 379, 381 (9th Cir.), cert. denied, 474 U.S.  
 4 838 (1985). There is a strong presumption that counsels conduct was the product of sound trial  
 5 strategy. Strickland, 466 U.S. at 690.

6 Under the second prong, the petitioner must demonstrate prejudice, that but for counsel's  
 7 unprofessional errors, the result would have been different. Strickland, 566 U.S. at 694. however,  
 8 sheer outcome determination is not sufficient to make out a Sixth Amendment violation; a proper  
 9 prejudice inquiry focuses on whether counsel's errors or omissions rendered the proceeding  
 10 fundamentally unfair or the result unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993).

11 Petitioner's claims fail on either prong. The defense in this case was that the plaintiff was on  
 12 the Gasaway property to work on his car and that he had no part in the methamphetamine lab located  
 13 on the property. (Dkt. # 17, Exhibit 3). The only claim petitioner asserted on direct appeal was that  
 14 counsel was ineffective in not calling his girlfriend to testify. The state court of appeals considered  
 15 plaintiffs issues on direct appeal. The court identified the proper standard of review and held:

16 ...Rogers must overcome a strong presumption that counsel's representation  
 17 was effective. He may do so by showing that counsel lacked a legitimate reason for  
 18 his prejudicial acts and omissions. But on appeal, we will not consider allegations  
 19 that are not supported by evidence in the trial court record.

20 Here, the record contains no information as to why counsel did not call  
 21 Rogers' girlfriend. Thus, Rogers has failed to overcome the strong presumption that  
 22 counsel either properly attempted to obtain this testimony or declined to do so for a  
 23 tactical reason.

24 (Dkt. # 17 Exhibit 3, citations omitted). The state court of appeals holding is neither contrary to, nor  
 25 an unreasonable application of, clearly established federal law, as determined by the Supreme Court.  
 26 Further, the ruling is a reasonable determination of the facts in light of the evidence presented to the  
 27 state courts.

28 Petitioner re-raised his ineffective assistance of counsel claim and added several other claims  
 29 of ineffective assistance of counsel in his personal restraint petitions. (Dkt. # 17, Exhibits 13 and  
 30 14). The state court of appeals held:

31 ...Rogers contends his counsel was deficient in (1) failing to cross-examine the

1 informant on the warrant, thereby violating the Confrontation Clause... (2) failing to  
 2 request a 'Frank's Hearing'; and (3) failing to request the court apply the Aguilar-  
 3 Spinelli test to the informant's tip. Because Rogers lacked standing to challenge the  
 warrant or the search, any of these requests by counsel would be futile.

4 Additionally, Rogers argues his counsel was ineffective in failing to request a  
 5 continuance in order for Logan to provide alibi testimony. He includes two affidavits  
 6 from Logan regarding her whereabouts on September 4, and 5, 1998, stating it is  
 7 newly discovered evidence. Logan's affidavits state she was not subpoenaed, arrived  
 late to court, and was not allowed to testify. Additionally, she explains that Rogers  
 was at his home the evening of September 4, 1998 and was taken to the Gasaway  
 property around 7:30 AM on September 5, 1998 to retrieve his car that had been left  
 there.

8 In reviewing a claim of ineffective assistance, there is a strong presumption  
 9 that counsel rendered adequate assistance and made all significant decisions in the  
 10 exercise of reasonable professional judgment. If counsels conduct can be  
 11 characterized as legitimate trial strategy or tactics, then it cannot serve as the basis for  
 a claim of ineffective assistance. Rogers cannot show omitting Logan's testimony  
 was not a legitimate trial strategy or tactic or that it would have changed the outcome  
 of the trial if believed. Thus, the ineffective counsel claim fails.

12 Rogers also claims ineffective assistance of appellate counsel. To succeed on  
 13 a claim of ineffective assistance of appellate counsel, he must show that (1) the legal  
 14 issue which appellate counsel failed to raise had merit, and (2) he was actually  
 prejudiced by the failure to raise it.

15 Rogers faults his appellate attorney for abandoning the issue of a privacy  
 16 interest in his vehicle. He cites the direct appeal opinion saying, "This was ineffective  
 17 assistance of Appeal Counsel, prejudicing Mr. Rogers.' Had appellate counsel not  
 18 abandoned this issue, the court would likely have ruled in Mr. Rogers; favor." The  
 19 opinion actually stated, "Below Rogers asserted that he had a privacy interest in the  
 property itself because he had paid Gasaway so he could leave his vehicle on the  
 property. He abandoned this argument on appeal." The opinion concluded Rogers  
 failed to establish a reasonable expectation of privacy in the Gasaway property and  
 therefore lacked standing to challenge the search of his vehicle. The privacy interest  
 lacks merit and Rogers was not prejudiced when it was abandoned.

20 (Dkt. # 17, Exhibit 17). The actual ruling of the state court of appeals on direct appeal included a  
 21 lengthy discussion as to whether petitioner had any legitimate expectation of privacy in the Gasaway  
 22 property. The court opined that even assuming Mr. Rogers' had paid to store his vehicle on the  
 23 Gasaway property while he worked on it, his property interests did not rise to any reasonable  
 24 expectation of privacy in the Gasaway property. Thus he did not have standing to challenge the  
 25 incidents that lead to issuance of the search warrant and his counsel was not ineffective. (Dkt. # 17,  
 26 Exhibit 3A, page 7 through 8).

27 As petitioner lacked standing to challenge the warrant in this case counsel was not ineffective  
 28 in failing to confront the 911 caller, failing to move for a "Franks" hearing, or failing to subpoena

1 Ms. Wencel. Additionally appellant counsel was not ineffective in abandoning the standing argument  
2 as the privacy interest asserted was insufficient to support a reasonable expectation of privacy in the  
3 property. Issues 2 a, b, c, and e are without merit.

4        Further, Mr. Rogers has not shown the testimony of his girlfriend would have changed the  
5        outcome of the trial given that the “search of Rogers’ vehicle revealed numerous items used in the  
6        manufacture of methamphetamine.” (Dkt. # 17, Exhibit 3A, page 3). Petitioner has failed to show  
7        counsels performance fell below an acceptable level. Petitioner has not shown the state court rulings  
8        to be contrary to, or an unreasonable application of, clearly established federal law, as determined by  
9        the Supreme Court. Nor has petitioner shown the rulings to be an unreasonable determination of the  
10       facts in light of the evidence presented to the state courts. The ineffective assistance of counsel  
11       claims are without merit.

### C. Confrontation clause.

13 Separate from his ineffective assistance of counsel claim, petitioner argues his right to  
14 confront witnesses was violated by allowing admission of the hearsay statements of the person who  
15 first reported the gas cloud on September 5<sup>th</sup>, 1998.

16       Counsel's waiver of any objection regarding this issue was reasonable trial strategy as the  
17 defense was not to deny the presents of a meth lab or gas cloud but to claim the petitioner was not  
18 involved. Further, petitioner lacked standing to challenge the issuance of a search warrant for the  
19 property or to challenge the factual assertions that led to issuance of the warrant. The state court  
20 was correct to dismiss this issue.

## CONCLUSION

22 This petition is without merit. Accordingly, the petition should be **DISMISSED WITH**  
23 **PREJUDICE**. A proposed order accompanies this report and recommendation.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
25 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
26 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
27 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
28 72(b), the clerk is directed to set the matter for consideration on **December 23<sup>rd</sup>, 2005**, as noted in

1 the caption.

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3 DATED this 5<sup>th</sup> day of December, 2005.

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Karen L. Strombom  
United States Magistrate Judge